NO. .....

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff.

v.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,
NORTHERN PACIFIC RAILROAD COMPANY,
a corporation,
NORTHERN PACIFIC RAILROAD COMPANY,
as reorganized in 1875.
NORTHWESTERN IMPROVEMENT COMPANY,
a corporation,
BANKERS TRUST COMPANY,
a corporation,
GUARANTY TRUST COMPANY,
a corporation,
CITY BANK FARMERS TRUST COMPANY,
a corporation.
Defendants.

CHARLES E. SCHMIDT, et al.,
Intervening Petitioners.

ON PETITIONS FOR APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITIONS FOR APPEAL.

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The United States is not interested in the controversy between the defendant Northern Pacific Railroad Company and its minority stockholders. But because those stockholders are attempting to take appeals, which, although they must inevitably be dismissed as not authorized by law, would nevertheless seriously interrupt the

District Court in its efforts to bring to a conclusion a suit of great public importance, the United States submits this memorandum in opposition to the granting of the petitions for appeal.

STATEMENT

In the absence of a record on appeal, a brief statement of the salient facts leading up to this litigation and of the relevant proceedings in the suit is submitted for the convenience of the Court.[1]

History of the Act Under Which Suit Was Brought

The suit in which the orders sought to be appealed from were made was filed by the Attorney General July 31, 1930, against the Northern Pacific Railroad Company, the Northern Pacific Railway Company, the Northwestern Improvement Company, one of its subsidiaries, and the trustees under outstanding mortgages, pursuant to the Act of June 25, 1929 (46 Stat. 41), the full text of which is quoted in the Appendix, *infra.*

The history of the Act referred to is as follows: The Act of July 2, 1864 (13 Stat. 365) and the Joint Resolution of May 31, 1870 (16 Stat. 378) made certain grants of public land to the Northern Pacific Railroad Company in aid of the construction of a railroad from Lake Superior to Puget Sound. After a railroad had been constructed, executive withdrawals of lands within the indemnity limits of the grant gave rise to a controversy between the United States and the Railway Company, successor to the Railroad Company, concerning the right

[1]Petitioners have left with Judge Wilbur a file which contains copies of some of the pleadings, motions and orders referred to herein. Unfortunately the file is not consecutively paged, and hence reference to the pages of the file cannot be made herein.

of the United States to make such withdrawals, and in a case begun about 1915, known as the Forest Reserve Case, the United States sought to cancel the patent to certain lands withdrawn for a national forest.

The decision of the Supreme Court in that case *(United States* v. *Northern Pac. Ry. Co.,* 256 U. S. 51), after stating (pages 58 to 60) the terms and history of the grants, held that "it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits." (pp. 66-67). The case was therefore remanded to afford the parties an opportunity to show whether there remained, after the withdrawals, sufficient public lands to satisfy all of the losses in the primary limits.

The Department of the Interior thereupon began to adjust the grant upon the basis of the Court's decision, but on June 5, 1924, the matter having come to the attention of Congress, a Joint Resolution was enacted (43 Stat. 461) suspending the adjustment and forbidding the issuance of further patents until a Congressional investigation could be had.

The Act of June 25, 1929, which resulted from this investigation, in general: (1) declared that the United States retained all withdrawn lands in the indemnity limits which at the time of withdrawal were available in satisfaction of the deficiency in the grant; (2) removed all such lands from the operation of the grant; (3) provided that the grantees should be entitled to receive compensation for such lands to the extent, if any, thereafter found to be due from the United States; (4) declared forfeit the unsatisfied indemnity selection rights and claims to

additional land; (5) authorized and directed the Attorney General to prosecute such suit or suits as might be necessary to remove the cloud cast upon the title of the United States to the land as a result of the claims of either the Railroad or Railway Company, and to have determined the controversies and disputes affecting the operation of the grants, and to obtain an accounting which would fix the amount of compensation, if any, to which the grantee might be entitled. Numerous questions to be submitted to the court were enumerated, "including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands." In brief, the Act of 1929 provided (a) that if the grantee is entitled to any further lands, the United States would pay for them rather than convey the lands to the grantee, and (b) that it should be determined by court action whether the grantee was entitled to further lands, and, if so, the compensation that should be paid therefor. 46 Stat. 41.

Suit Filed in 1930. First Phase.

This suit was filed in the United States District Court for the Eastern District of Washington, July 31, 1930, and took the form of a bill to quiet title in the United States to approximately 2,900,000 acres of withdrawn land in the claimed indemnity limits. The bill of complaint contained (a) numerous charges of violation of the grant, (b) allegations of fraud in the performance of it, and (c) allegations of errors in its administration. Among the charges of breach of the grant were allegations that the mortgage foreclosure proceedings through

which the Railway Company had succeeded to the interests of the Railroad Company in 1896 were invalid and that such proceedings constituted, as between the Government and the Railroad Company, a breach of the terms of the grant on account of which the Company lost all right to receive further indemnity lands from the United States. A voluntary appearance was entered by all defendants. The Railway Company filed an answer which contained a general motion to dismiss and which pleaded the defenses of equitable estoppel, res adjudicata, laches, statute of limitations, and other defenses. The Railroad Company first filed a disclaimer of any interest in the subject-matter of the suit, which was later stricken on motion of the Government, and the Railroad Company filed an answer in which, *inter alia,* it adopted by reference the answer of the Railway Company.

On February 25, 1932, the trial court appointed Frank H. Graves as Special Master, and under Equity Rule 29 the defenses raised by the pleadings were called up for hearing prior to trial. Upon motion of the Railroad Company the defenses raised in its answer were also referred to the Master on May 24, 1932. After a hearing on the issues thus raised extending over a period of more than a month, the Master then filed his report on May 31, 1933, which was generally favorable to the defendants and in which he ruled that the Government was estopped from attacking the validity of the 1896 mortgage foreclosure sale. Exceptions which had been filed and argued by the parties on both sides, were overruled, and by its order of October 3, 1935, the court adopted the report of the Master "in its entirety."

Second Phase.

Thereafter, on April 21, 1936, the case was referred back to the Master, with directions to determine the lands, if any, for which the defendants are entitled to receive compensation, leaving for later determination the amount of compensation.

After a hearing which lasted for more than ten months, and on July 26, 1937, the Master filed his second report, finding that the railroad was entitled to compensation for approximately 2,400,000 acres. Again exceptions were filed to the report by the parties on both sides within twenty days after it was made, as required by Equity Rule 66.

Some Issues Remain Undetermined.

It will be noted that the report of the Master just referred to did not pass upon the amount of compensation, which remains undetermined. It was believed that it would be to the advantage of all parties to have a decision of the Supreme Court finally determining the lands for which compensation must be paid, before introduction of evidence should begin upon the *third phase* of the case, which might be called the *valuation* phase, since the appraisal of such a vast acreage is obviously an expensive undertaking. Accordingly, the Act of May 22, 1936, (49 Stat.. 1369), authorizing a direct appeal to the Supreme Court from the orders entered in the *first* and *second* phases of the case, was passed, copy of which is set forth in the Appendix, *infra.*

Petitioners' First Appearance.

It was not until after the Master's second report had been filed, and more than six years after the bill of com-

plaint had been filed that the petitioners here first made themselves known. On August 25, 1937, and after the time for filing exceptions had expired, they filed a motion to extend for thirty days the time "within which the said Northern Pacific Railroad Company may file exceptions to the report of Commissioner Frank H. Graves." Then, on September 3, 1937, and without first having obtained leave of court, petitioners filed an answer and cross-bill entitled "Northern Pacific Railroad Company by Charles E. Schmidt and other minority stockholders" in which it was generally alleged that the Railroad Company was being held "in captivity" by the Railway Company and which asked the court to determine a variety of issues with respect to the legality of the corporate organization of the Northern Pacific Railway Company and, in addition to the lands in suit, the ownership of all property held by the Railway Company.

Thereafter, on January 31, 1938, petitioners filed a motion for leave to file a petition in intervention in the cause "on their own behalf and all other stockholders similarly situated," the petition setting forth allegations which were similar to those made in the answer and cross-bill and praying for substantially the same relief. Finally, on February 19, 1938, six months after the date of the Master's second report and without first having sought or obtained leave, petitioners filed a motion "to construe, modify, and/or amend" the report which, in effect, asked the court to determine which of the two companies "is the owner and entitled to possession of the land, land grants, rights to land, property, and all other assets involved in and covered by said report." On the

same day petitioners filed their exceptions, in which they "make and adopt each and all of the exceptions to said report heretofore filed in this cause on behalf of the Northern Pacific Railway Company and Northern Pacific Railroad Company." Both the motion to extend time and exceptions were stricken from the files by the Order of March 9, 1938, referred to *infra*.

On March 9, 1938, the court entered an order striking from the files all documents filed by petitioners, including their answer and cross-bill, petition to intervene, and motion to construe the Master's report. Petitioners then filed a series of motions which, in effect, asked the court to overrule its order, and "to dismiss the original and amended bill of complaint heretofore filed." On March 22, 1938, in its order denying all of these motions the court expressly stated that his order was made without prejudice to the right of petitioners—

> to assert later in this cause, when the fund, if any, to be distributed by the United States is established and fixed, or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition.

Meanwhile, the exceptions to the second report of the Master filed by the parties to the suit having come on for hearing, the court made an order, also on March 22, 1938, sustaining and overruling various exceptions and reserving ruling on others, and containing the following recital:

> It further appearing to the court that there are additional matters connected with such report of the Master, which are yet to be considered and determined by the court before the review of said report may be completed, and that for the purpose of completing the review of said report of the Master and

in order to enter an order or decree of this Court upon such review as required by the Act of June 25, 1929, and from which order or decree an appeal is authorized by the Act of May 22, 1936, it is necessary that the court make such Findings of Fact and Conclusions of Law as the Court's review of said Master's report may require;

IT IS ORDERED, that the parties hereto submit to the Court their proposed Findings of Fact and Conclusions of Law, together with their suggested draft or drafts of such order or decree.

History of Petitioners' Attempts to Appeal.

1. On March 22, 1938, the day on which the order last mentioned was signed, the present petitioners filed with the clerk of the District Court petitions for appeal[2] in substantially the same form as those filed by them in the District Court on ~~March 23~~ May 24, 1938 and which have been certified to this court in connection with the present application except that those petitions were for appeals to the Supreme Court, petitioners invoking the Act of May 22, 1936. The following day, March 23, Judge Webster allowed those petitions, but thereafter on March 30, and within the term, he made an order vacating the allowance of such appeals, reciting that "it is questionable whether said appeals and citations should have been granted," and set the petitions for hearing at a later date. Thereafter a motion was made to strike the order of March 30 vacating the allowance of the appeals and on April 30, 1938, this motion and the petition for ap-

[2]It will be noted that the minority stockholders have throughout filed concurrent petitions, in one calling themselves "Intervening Petitioners," and in the other "Northern Pacific Railroad Company, by minority stockholders." There is no claim that they are authorized to represent the defendant Northern Pacific Railroad Company, which has appeared by answer and is regularly represented by counsel.

peal, having been heard by Judge Webster, were by him denied, his order reciting:

> That the orders of the court entered on March 23, 1938, allowing said appeals, were made through inadvertence and mistake, and were improvidently granted, that the order or decree upon a review of the report of the Special Master filed July 26, 1937, from which an appeal is authorized by the Act of May 22, 1936, has not yet been made or entered; that the Northern Pacific Railroad Company is and has been since the date of the filing of its answer herein represented by counsel of record in this suit, who have not attempted to obtain any order allowing an appeal, and that counsel presenting said petitions for appeal are not authorized to represent said Northern Pacific Railroad Company or any other party to this suit.

2. Thereafter and on May 3, 1938 petitioners filed petitions in the Supreme Court without disclosing the ruling of the court below or the contents of its order of April 30, 1938,[3] which petitions were for an order allowing them a direct appeal from the orders referred to in their former petition to Judge Webster, and the petitions prayed in the alternative that the Supreme Court hold and declare that the appeal allowed by the trial court on March 23, 1938 which had been vacated and denied was "still in effect and binding and that the same be docketed." Thereafter and without opinion the Supreme Court on May 16, 1938 denied those petitions.

3. May 24, 1938, petitioners filed the petitions for appeal directed to the Judge of the District Court, and which in their original form have been certified here. Judge Webster denied the petitions June 1, 1938. Ex-

[3]We are furnishing the Court with a copy of the order and ruling.

cept that these petitions pray appeals to this court, rather than to the Supreme Court, they were in substance the same as the first petitions of March 22, 1938.

4. The petitions now presented to Judge Wilbur and now before this court pray appeals from the same orders listed in the petitions of May 24, 1938, as presented to and denied by the District Judge; but in addition thereto appeal is sought from other orders, not itemized in the petition which Judge Webster denied as follows:

In the petition of "Northern Pacific Railroad Company by Minority Stockholders," there has been added to the orders from which appeal is sought an order of March 9, 1938, "striking answer and cross-bill of Petitioner filed herein September 3rd, 1937."

In the petition of "Intervening Petitioners," there has been likewise added an order of March 9, 1938, denying "the motion to file Intervention Petition and striking Petition filed herein January 31st, 1938." This is the first and only attempt made to appeal from the denial of leave to intervene. No explanation is given as to why it is sought in these petitions thus to enlarge the scope of the petitions presented to Judge Webster.

ARGUMENT

This Court has had frequent occasion to dismiss appeals improvidently taken by counsel or allowed by the District Court. Often this action has been upon the Court's own motion. *City and County of San Francisco* v. *McLaughlin* (C. C. A. 9th), 9 F. (2d) 390; *Robinson* v. *Edler* (C. C. A. 9th), 78 F. (2d) 817. These cases suggest the duty of the court or judge to scrutinize such petitions for the reasons well stated in *Alaska Packers Ass'n.* v. *Pillsbury,* 301 U. S. 174, 177, as follows:

> The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the Circuit Court of Appeals; that the decree is of such finality or character that it may be re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right, the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to which the application is to be made.

For the purpose of disclosing the utter impropriety of any of the appeals sought, we shall discuss separately the orders from which petitioners seek to appeal.

1. *The order of May 24, 1932 referring the cause to a Special Master.*[4]

Such an order may not be appealed from at this time by these petitioners for:

(a) The order was made more than six years ago.

(b) The petitioners were not then, and are not now, parties to the suit, and hence have no standing to appeal.

Ex parte Cutting, 94 U. S. 14.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578.

Ex parte Cockroft, 104 U. S. 578.

See also cases cited in *In re 211 East Delaware Place Bldg. Corporation,* 15 F. Supp. 947, 948.

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[4]That petitioners seriously undertake to appeal from this order is made manifest by the first assignment of error of "Northern Pacific Railroad Company, by Charles E. Schmidt," etc.

(c) The petitioners, even if allowed to intervene, could do so only in subordination to, and in recognition of, the propriety of the main proceeding, as intervention will not be allowed for the purpose of impeaching a decree or order already made.

Equity Rule 37.

United States v. *California Co-operative Canneries,* 279 U. S. 553, 556 and note.

Merriam v. *Bryan,* (C. C. A. 9th) 36 F. (2d) 578.

(d) An order of reference is not final and is not appealable.

Dodge Mfg. Co. v. *Patten* (C. C. A. 7th), 43 F. (2d) 472.

See *Rexford* v. *Brunswick-Balke Co.,* 228 U. S. 339, 346.

2. *The order of October 3, 1935, amended January 29, 1936 confirming the first report of the Master.* (See Assignments of Error II, IV, V, VI and VII of "Northern Pacific Railroad Company, by Charles E. Schmidt.")

Such order is not now appealable to this court, by these petitioners, for all the reasons that the order of reference, just mentioned, is not appealable (the lapse of more than two years, the petitioners' lack of standing, either as parties or interveners, and the lack of finality in the order) and also for an additional reason. This is that since this order is made appealable directly to the Supreme Court by the Act of May 22, 1936, an appeal to this court, even if the same were otherwise allowable, is thereby impliedly prohibited.[5]

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[5]Even under the Act of May 22, 1936, the direct appeal to the Supreme Court from this order may be taken only during the sixty day period following the order of the court on a review of the Master's second report, which order has not yet been entered.

United States v. *California Co-operative Canneries,* 279 U. S. 553, at p. 559.

3. (In petition of "Northern Pacific Railroad Company by Minority Stockholders.") *Orders of March 9, 1938: (a) Striking the answer and cross-bill of petitioner filed (without leave of court) September 3, 1937; (b) denying the motion to construe, modify or amend the Master's second report; and (c) striking out the exceptions of the Railroad Company (by minority stockholders) to said report.*

Item (a) has been inserted since the petition was denied by Judge Webster. How one not a party, whose answer, filed without leave of court is stricken, may appeal from such order is difficult to perceive. Even a party may not appeal from such a ruling.

City and County of San Francisco v. *McLaughlin* (C. C. A. 9th), 9 F. (2d) 390.

Ayres v. *Carver,* 17 How. 708.

United States v. *Continental Casualty Co.* (C. C. A. 2d), 69 F. (2d) 107.

Dye v. *Farm Mortgage Inv. Co.* (C. C. A. 10th), 70 F. (2d) 514.

Items (b) and (c) relate to belated attempts of these non-parties to attack the Master's report of July 26, 1937. (The so-called "Motion to construe" the report and petitioners' purported exceptions were both filed February 19, 1938, more than six months later.) Because they are not parties, they have no standing to attack the report. And even if they were parties to the suit, they could not appeal from such orders as these because they are not in any sense final.

Rexford v. *Brunswick-Balke Co.,* 228 U. S. 339, 345-346.

R. M. Hollingshead Co. v. *Bassick* (C. C. A. 6th), 50 F. (2d) 592, 53 F. (2d) 470.

Nor could the parties themselves raise any question as to the Master's report except in connection with an appeal from the order contemplated by the Act of May 22, 1936, "entered upon a review of the report of the Master." Such an order has not yet been entered, as will be pointed out more fully hereafter.

4. *Orders of March 22, 1938 (a) overruling and sustaining certain exceptions to the Master's report of July 26, 1937, and (b) denying motions to dismiss the bill and a petition to rehear the matters ruled upon on March 9, 1938.*

Particular attention is called to the order of March 22, 1938, in which the court ruled on certain exceptions to the Master's report filed by the parties to the suit, reserved ruling upon others, and directed the parties to prepare and file their proposed findings. The final paragraph of this order is quoted, *ante* p. 8. Pursuant to this order the parties to the suit have been in consultation and have been preparing proposed Findings of Fact and Conclusions of Law as well as a proposed form of an Order or Decree to submit to Judge Webster. When such order has been entered, the Government will perfect an appeal to the Supreme Court under the authority of the Act of May 22, 1936, and it is understood that the defendants will take a cross-appeal. So many diverse and difficult questions are involved, and the lands affected and to be described are so extensive and fall in so many different categories, that the labor of compiling and revising tabulations of lands and sundry findings to conform to the court's directions, is enormous. Counsel rep-

resenting all parties have been working continuously upon this task, in an effort to expedite the conclusion of the case in the District Court. Were this court to allow the attempted appeal at this premature date, the completion of the District Court's Findings may be stopped and the contemplated Order or Decree needlessly delayed, and the whole purpose of the Act of May 22, 1936, which was designed to expedite the final determination of the issues in the case, would be completely frustrated.

When the content of this order of March 22, 1938 is examined, particularly the concluding paragraphs quoted *supra,* no citation of authorities should be required to disclose that not even a party to the suit would be permitted an appeal therefrom. It is utterly lacking in finality.

Century Indemnity Co. v. *Nelson* (decided February 28, 1938) 58 S. Ct. 531, 82 L. Ed. 535.)

Walter Scott & Co. v. *Wilson* (C. C. A. 7th), 115 Fed. 284.

R. M. Hollingshead Co. v. *Bassick Mfg. Co.* (C. C. A. 6th), 50 F. (2d) 592.

Collins v. *Miller,* 252 U. S. 364, 370.

5. *The order of March 22, 1938, denying the minority stockholders' motion to dismiss the bill and their petition for a rehearing of orders of March 9, 1938.*

The attempt of one not a party to a suit, or even of one seeking to intervene in a suit, to appeal from an order denying his motion to dismiss the bill, borders on the ridiculous. The authorities heretofore cited sufficiently disclose the absurdity of this portion of the petitions.

6. (In the "Petition for Appeal of Intervening Petitioners.") *The Order of March 9, 1938 denying the motion to file Intervention Petition.*

Here for the first time in two months of fruitless applications for appeal—to Judge Webster on March 22, 1938, to the Supreme Court on May 3, 1938, and again to Judge Webster on May 24, 1938—is there any reference to an order denying intervention.

Such attempted appeal should be denied for the following reasons:

(a) The order denying the motion for leave to intervene is not an appealable order.

The question which the intervening petitioners seek to litigate in this cause is whether the property claimed by the Railway Company, including any compensation for withdrawn lands retained by the plaintiff under the Act of June 25, 1929, is in fact the property of the Railway Company or of the Railroad Company. It should be noted that no contention is made that the defendant companies are not adequately presenting their claim for lands and compensation from the United States. It is not asserted that any fund which might ultimately be distributable would be enhanced if petitioners were permitted to intervene. No reason is given why there is any necessity for the presence of the United States as a party to a proceeding to determine, as between the minority stockholders of the Railroad Company and the Railway Company, whether compensation paid by the plaintiff, if any is paid, belongs to the Railway Company or the Railroad Company.

The rule is that the granting of leave to intervene is ordinarily within the discretion of the trial court and an order denying such leave is not appealable since the petitioner is "at full liberty to assert his rights in any other appropriate form of proceeding."

Rodman v. *Richfield Oil Co. of California* (C. C. A. 9th), 66 F. (2d) 244.

Baker et al. v. *Spokane Savings Bank et al.* (C. C. A. 9th), 71 F. (2d) 487.

State of Washington v. *United States* (C. C. A. 9th), 87 F. (2d) 421.

See cases cited in *United States* v. *California Co-operative Canneries,* 279 U. S. 553 at p. 556.

An order denying intervention is appealable only when the petitioner has no "other appropriate form of proceeding" open to him, *State of Washington* v. *United States, supra,* or where there is a fund in court "which will be lost in the event that he is not allowed to intervene before the fund is dissipated." *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315, 316. No such situation exists here.

Here the question sought to be raised by the petitioners against the defendant companies can as well or better be litigated in any other appropriate form of proceeding. The fact that the minority stockholders believe they may obtain the relief they ask in other proceedings is evidenced by the fact that for thirty years they have had a case pending in the federal court in New York which they have recently had revived. The object of that proceeding is to have the "business, Railroad System, land grants and property" of the Railroad Company "restored" to it. (See Assignment of Errors No. XXI.) It is obvious that if the claim asserted by the minority stockholders is valid, it extends to all of the assets in the possession of the Railway Company. It is difficult to perceive why such a claim in which the United States has no interest should be injected into this suit which relates

solely to certain aspects of the railroad's land grant.

Judge Webster was therefore acting within his discretion when he denied petitioners' application to intervene. By his order he protected whatever interests the minority stockholders may have by providing that the order was without prejudice to the rights of such minority stockholders to assert their claims later in this proceeding or in any other proceeding. Since the order denying the application to intervene was not a denial of relief to which the minority stockholders are entitled, it is not an appealable order.

In the case of *Rodman* v. *Richfield Oil Co. of California,* (supra) this court said (pp. 251-252):

> Since the appellant does not have the absolute right to intervene, his petition necessarily falls within the category of those the granting of which lies in the sound discretion of the court. Indeed, as we shall presently see, the general rule is that the granting of a petition to intervene is discretionary.
>
> Equity Rule 37 (28 USCA § 723) provides, in part, as follows: "Anyone claiming an interest in the litigation *may* at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." (Italics our own.)
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> In Credits Commutation Co. v. United States, 177 U. S. 311, 315, 316, 20 S. St. 638, 44 L. Ed. 782, cited by the appellant himself, the court said:
>
> > "The question was well considered by the circuit court of appeals (91 F. 570), and we quote and adopt its statement, as follows:
> >
> > " 'When such action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are

aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. *** It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervener's claim by denying him all right to relief. The cases at bar, however, are not of that character.' ''

(b) The application to intervene was not timely made.

It was therefore not only within the discretion of the trial court to deny it—it was its duty to do so.

That therefore the appeal should be disallowed is suggested by the case of *Merriam* v. *Bryan et al.* (C. C. A. 9th), 36 F. (2d) 578, where this court said (p. 579):

> It will thus be seen that more than three years elapsed between the commencement of the principal suit and the filing of the motion for leave to intervene. The rule is well settled that applications of this kind must be in subordination to and in recog-

nition of the propriety of the main proceedings, that they must be timely made, and that they are addressed to the sound discretion of the court. Equity Rule 37; Buel v. Farmers' Loan & Trust Co. (C. C. A.) 104 F. 839, 842. The rule is well stated in the Buel Case, in an opinion participated in by Judges Lurton and Day:

> "It seems to be quite well settled that the granting leave to intervene in a case to which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things, the court will regard the seasonableness of the application, and the extent to which those already parties to the suit may be injuriously affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasonably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill."

The present application does not satisfy any of these requirements. The appellant had full knowledge of the pendency of the principal suit from the beginning, was a witness at the trial, and has offered no excuse whatever for the delay.

Petitioners claim that they "had since 1900 continuously sought a Congressional Investigation *** and *** believe they can state, without fear of successful challenge, that but for the continuous acts and efforts of the Petitioners, the Joint Congressional Committee investigation of 1925, resulting in the Act of June 25, 1929, would never have been obtained, or the act passed, or this suit authorized but for such efforts of the Petitioners *** " (Assignment of Error No. XXI). The suit con-

templated by the Act was commenced July 31, 1930, but the motion for leave to file a petition in intervention was not filed until January 31, 1938, exactly seven and one half years after the suit was filed and six months after the case had been tried to the Special Master and his report had been filed. Counsel for petitioners knew of the pendency of the suit from the time it was commenced. The delay in moving to intervene is wholly unexcused and inexcusable. Under such circumstances Judge Webster was acting entirely within his discretion in denying the request.

CONCLUSION

The cause pending in the court below is of considerable magnitude and great public importance. After a long and arduous course of litigation, the matter has reached a stage where an appeal will shortly be taken to the Supreme Court by the real parties in interest. Counsel for the parties on both sides are now diligently engaged in preparing Findings of Fact and Conclusions of Law as well as a proposed form of an Order or Decree which will be the basis of an appeal to the Supreme Court immediately following its entry. If, however, these petitioners are permitted to appeal at this premature date, further proceedings may be stopped and the contemplated Order or Decree needlessly delayed to the detriment of the public interest and the great expense and hardship of the parties.

If these petitions are granted, the remaining available remedy of a motion to dismiss the appeal would be wholly inadequate since the motion might not be decided until

the fall term. Meanwhile, the adoption of findings and conclusions and the entry of an order might not be made.

It is therefore respectfully submitted that the petitions for appeal should be denied.

WALTER L. POPE,
Missoula, Montana.
E. E. DANLY,
Washington, D. C.
Special Assistants to
the Attorney General.

APPENDIX

Act of June 25, 1929, c. 41, 46 Stat. 41:

An Act To alter and amend an Act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," approved July 2, 1864, and to alter and amend a joint resolution entitled "Joint resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870; to declare forfeited to the United States certain claimed rights asserted by the Northern Pacific Railroad Company, or the Northern Pacific Railway Company; to direct the institution and prosecution of proceedings looking to the adjustment of the grant, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any and all lands within the indemnity limits of the land grants made by Congress to the Northern Pacific Railroad Company under the Act of July 2, 1864, and the resolution of May 31, 1870, which, on June 5, 1924, were embraced within the exterior boundaries of any national forest or other Government reservation and which, in the event of a deficiency in the said land grants to the Northern Pacific Railroad Company upon the dates of the withdrawals of the said indemnity lands for governmental purposes, would be, or were, available to the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, by indemnity selection or otherwise in satisfaction of such deficiency in said land grants, are hereby taken out of and removed from the operation of the said land grants, and are hereby retained by the United States as part and parcel of the Government reservations wherein they are situate, relieved and freed from all claims, if any exist, which the

Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, may have to acquire the said lands by indemnity selection or otherwise in satisfaction of the said land grants: *Provided,* That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.

Sec. 2. That all of the unsatisfied indemnity selection rights, if any exist, claimed by the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, or by any grantee or assignee of either or both, together with all claims to additional lands under and by virtue of the land grants contained in the Act of July 2, 1864, and resolution of May 31, 1870, or any other Acts of Congress supplemental or relating thereto, are hereby declared forfeited to the United States.

Sec. 3. The rights reserved to the United States in the Act of July 2, 1864, to add to, alter, amend, or repeal said Act, and in the resolution of May 31, 1870, to alter or amend said resolution, are not to be considered as fully exercised, waived, or destroyed by this Act or the exercise of the authority conferred hereby; and the passage of this Act shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto.

Sec. 4. The provisions of this Act shall not be con-

strued as affecting the present title of the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, or any subsidiary of either or both, in the right of way of said road or lands actually used in good faith by the Northern Pacific Railway Company in the operation of said road.

Sec. 5. The Attorney General is hereby authorized and directed forthwith to institute and prosecute such suit, or suits, as may, in his judgment, be required to remove the cloud cast upon the title to lands belonging to the United States as a result of the claim of said companies, and to have all said controversies and disputes respecting the operation and effect of said grants, and actions taken under them, judicially determined, and a full accounting had between the United States and said companies, and a determination made of the extent, if any, to which the said companies, or either of them, may be entitled to have patented to them additional lands of the United States in satisfaction of said grants, and as to whether either of the said companies is lawfully entitled to all or any part of the lands within the indemnity limits for which patents have not issued, and the extent to which the United States may be entitled to recover lands wrongfully patented or certified. In the judicial proceedings contemplated by this Act there shall be presented, and the court or courts shall consider, make findings relating to, and determine to what extent the terms, conditions, and covenants, expressed or implied, in said granting Acts have been performed by the United States, and by the Northern Pacific Railroad Company, or its successors, including the legal effect of the foreclosure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands and

relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of said grants or Acts supplemental or relating thereto, or otherwise, and the United States and the Northern Pacific Railroad Company, or the Northern Pacific Railway Company, or any other proper person, shall be entitled to have heard and determined by the court all questions of law and fact and all other claims and matters which may be germane to a full and complete adjudication of the respective rights of the United States and said companies or their successors in interest under said Act of July 2, 1864, and said joint resolution of May 31, 1870, and in other Acts or resolutions supplemental thereto, and all other questions of law and fact presented to the joint congressional committee appointed under authority of the joint resolution of Congress of June 5, 1924 (Forty-third Statutes, page 461), notwithstanding that such matters may not be specifically mentioned in this enactment.

Sec. 6. All lands received by the Northern Pacific Railroad Company or its successors, the Northern Pacific Railway Company, under said grants or Acts of Congress supplemental or relating thereto which have not been earned, but which have been, for any reason, erroneously credited or patented to either of said companies, or its, or their, successors, shall be fully accounted for by said companies, either by restitution of the land itself, where the said lands have not passed into the hands of innocent purchasers for value, or otherwise, in accordance with the findings and decrees of the courts. In fixing the amount, if any, the said companies are entitled to receive on account of the retention by the United States of indemnity lands within national forests and other Government reservations, as by this enactment provided, the court shall determine the full value of the interest which may be rightfully claimed

by said companies, or either of them, in said lands under the terms of said grants, and shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive, either as a result of breaches of the terms, conditions, or covenants, either expressed or implied, of said granting Acts by said companies, or either of them, or through mistake of law or fact, or through misapprehension as to the proper construction of said grants, or as a result of fraud, or otherwise, and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court. To carry out this enactment the court may render such judgments and decrees as law and equity may require.

Sec. 7. The suit, or suits, herein authorized shall be brought in a district court of the United States for some district within the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, or Oregon, and may be consolidated with any other actions now pending between the same parties in the same court involving the subject matter, and any such court shall in any such suit have jurisdiction to hear and determine all matters and things submitted to it in pursuance of the provisions of this Act, and in any such suit brought by the Attorney General hereunder any persons having an interest in or lien upon any lands included in the lands claimed by the United States, or by said companies, or any interest in the proceeds or avails thereof may be made parties. On filing the complaint in such cause, writs of subpoena may be issued by the court against any parties defendant, which writs shall run into any districts and shall be served, as any other like process, by the respective marshals of such districts. The judgment, or judgments, which may be rendered in said district court shall be subject to review on appeal by the United States circuit court of appeals for the circuit which includes the district in which the suit is brought, and the judgment, or judgments, of such United States

circuit court of appeals shall be reviewable by the Supreme Court of the United States, as in other cases. Any case begun in accordance with this Act shall be expedited in every way and be assigned for hearing at the earliest practicable day in any court in which it may be pending. Congress shall be given a reasonable time, which shall be fixed by the court, within which it may enact such legislation and appropriate such sums of money as may be necessary to meet the requirements of any final judgment resulting by reason of the litigation herein provided for.

Sec. 8. It shall be the duty of the Attorney General to report to the Congress of the United States any final determinations rendered in such suit or proceedings, and the Attorney General, the Secretary of the Interior, and the Secretary of Agriculture shall thereafter submit to Congress recommendations for the enactment of such legislation, if any, as may be deemed by them to be desirable in the interests of the United States in connection with the execution of said decree or otherwise.

Sec. 9. That the Secretary of the Interior is hereby directed to withhold his approval of the adjustment of the Northern Pacific land grants under the Act of July 2, 1864, and the joint resolution of May 31, 1870, and other Acts relating thereto and he is also hereby directed to withhold the issuance of any further patents and muniments of title under said Act and the said resolution, or any legislative enactments supplemental thereto, or connected therewith, until the suit or suits contemplated by this Act shall have been finally determined: *Provided,* That this Act shall not prevent the adjudication of any claims arising under the public land laws where the claimants are not seeking title through the grants to the Northern Pacific Railroad Company, or its successors, or any Acts in modification thereof or supplemental thereto.

Approved, June 25, 1929.

Act of May 22, 1936, c. 444, 49 Stat. 1369:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the suit entitled United States of America, plaintiff, against Northern Pacific Railway Company and others, defendants, numbered E-4389, instituted and pending in the District Court of the United States for the Eastern District of Washington, under the authority and direction of the Act of June 25, 1929 (ch. 41, 46 Stat. L. 41), now on reference to a special master for hearing under an order of said court entered in said suit on April 21, 1936, a direct review by the Supreme Court of the United States by appeal may be had by any party to said suit of any order or decree of said district court entered upon a review of the report of the master to be made pursuant to said order of April 21, 1936, and also of the order or decree of said district court entered in said suit on October 3, 1935, as amended by an order of January 29, 1936. Such direct review by the Supreme Court of either or both of the said orders or decrees may be had by appeal taken within sixty days from the date of the order or decree of the district court entered upon a review of the report of the master to be made pursuant to the said order of April 21, 1936. The right of review of any final judgment, authorized by said Act of June 25, 1929, shall continue in force and effect.